

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

L. PATRICK GRAY, III  
W. MARK FELT and  
EDWARD S. MILLER

Criminal No. 78-000179

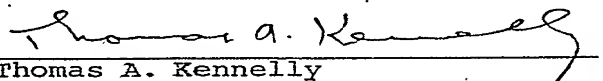
MOTION BY DEFENDANT MILLER  
TO DISMISS INDICTMENT


Defendant Edward S. Miller, by his undersigned counsel, moves the Court to dismiss the indictment against him on the ground that the Government has failed to comply with the discovery order issued by the Court on August 17, 1978, as supplemented by the Court's oral instructions to the Government in open court on March 15, 1979.

A Memorandum of Points and Authorities in support of this Motion is attached hereto.

Respectfully submitted,

DIUGUID, SIEGEL & KENNELLY

  
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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

v. :

L. PATRICK GRAY, III  
W. MARK FELT and  
EDWARD S. MILLER :

Criminal No. 78-000179

Defendants :

MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION BY DEFENDANT  
MILLER TO DISCUSS INDICTMENT

As the Court is well aware, there has been a continuing controversy between the government and defendants Miller and Felt over the government's failure to produce certain discovery documents ordered by the Court. Primarily the controversy involves documents in the files of the Intelligence Division of the Federal Bureau of Investigation, which contain information received from foreign intelligence sources and from the National Security Agency, showing that members of the Weatherman Underground Organization had connections with foreign countries, traveled to and from foreign countries, sent or received communications to or from foreign countries, or received financial or other assistance from foreign countries. Mr. Miller had access to these documents while he was Director of the Intelligence Division during the period of this indictment.

The Court initially ordered discovery of these documents to defendants Miller and Felt in its Memorandum and Order filed herein on August 17, 1978.

The government's failure to produce said FBI documents received from foreign intelligence sources and from NSA was brought to the Court's attention by Miller's "Motion to Compel

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Discovery re Foreign Connections of Weatherman" filed on December 13, 1978; by "Miller's Status Report re Unfinished Pre-Trial Matters", filed on January 8, 1979; and by "Miller's Statement re Unresolved Pre-Trial Discovery Matters" filed on January 16, 1979.

On February 22, 1979, at a hearing among all counsel in chambers, the Court again ordered the government to produce the said documents. The government failed to do so.

Finally, on March 15, 1979, at a hearing in open court, the government was ordered to produce said documents and to complete all discovery by March 30, 1979.

With specific reference to the foreign contacts of the Weatherman Underground Organization, government counsel Mr. Martin demonstrated that he was aware of his obligations:

But I believe it's defense counsel's contention, and to a great degree I concur with it, that we should try to finish the discovery process. That is, make sure they have all of the information about the Weathermen's foreign contacts that they could have had available to them in 1972-73 when they were making the decisions that are the subject matter of this indictment (3/15/79 hearing transcript, p. 17).

Government counsel, Mr. Skolnik concurred in this understanding of his obligation:

MR. SKOLNIK: \* \* \*. All that we can with precision determine is what information was in the files of the FBI in 1972 and '73 and, therefore, by definition, accessible to the defendants.

THE COURT: That's easy to determine, isn't it?

MR. SKOLNIK: Yes, sir. That's easy.

THE COURT: Well, just turn it over to them. (Tr., p.18).

The Court made clear in the hearing that all discovery must be complied with by March 30th:

THE COURT: You say a little more time. I will tell you, I would like to have some certification from you by the end of the month, Friday the 30th, that you've complied with all of the discovery.

MR. SKOLNIK: That's satisfactory, your Honor.

THE COURT: And, Mr. Martin, however many people you're dealing with, if they have any interest in this prosecution -- if that certification isn't forthcoming on that date, I'll entertain a motion from the defense counsel. (Tr., p. 23-24).

The government's obligations were further clarified in the following colloquy:

MR. MARTIN: Your Honor, all I wanted to make was a very simple point. We will hopefully be able to certify that we have complied with discovery as far as we're concerned. I believe defense counsel will dispute that.

THE COURT: Wait a minute. What do you mean by "as far as we're concerned"?

MR. MARTIN: That is, hopefully by the 30th, we will be able to disclose everything we can to the defense counsel.

THE COURT: Not everything you can. Everything they've asked for. Everything you're obligated to disclose to them. (Tr., pp. 25-26).

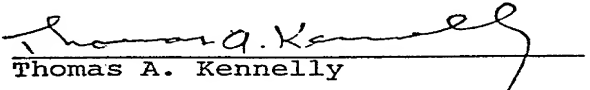
Undersigned counsel for Mr. Miller have now examined all documents turned over to them by the government since March 15, 1979. By the affidavit of Thomas A. Kennelly, attached hereto as Exhibit "A", counsel for Mr. Miller state that the

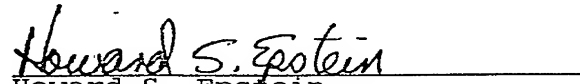
government has not provided them with any documents from the National Security Agency nor any documents from foreign intelligence sources concerning foreign connections or foreign collaboration by members of the Weatherman Organization. Counsel for defendant Miller have previously been advised by government counsel that upwards of 500 such documents do exist and are located in the files of the FBI.

For the reasons set forth herein, the motion to dismiss the indictment should be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
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UNITED STATES OF AMERICA :

v. :

Criminal No. 78-000179

L. PATRICK GRAY, III  
W. MARK FELT and  
EDWARD S. MILLER :

AFFIDAVIT

THOMAS A. KENNELLY, having been sworn, states as follows:

1. I am counsel for Mr. Edward S. Miller, defendant in this case. Assisting me is Howard S. Epstein, Esquire of this law firm.

2. Mr. Epstein and I have examined the documents which the government has turned over to us for inspection since the hearing in open court on March 15, 1979. These consist of:

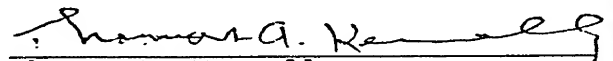
- . Approximately 37 FBI documents containing information from the CIA
- . Approximately 12 FBI documents containing Sensitive Compartmented Information
- . Approximately 25 documents from the White House (National Security Council and the President's Foreign Intelligence Advisory Board)
- . Approximately 150 FBI documents containing information from the Bureau's own sources

3. To the best of my knowledge and belief, the government has not permitted us to inspect any documents from the

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National Security Agency nor any documents from foreign intelligence sources concerning foreign connections or foreign collaboration by members of the Weatherman organization.

4. It is my understanding that there are upwards of 500 documents containing such information from the NSA and from foreign intelligence sources in the files of the Intelligence Division of the Federal Bureau of Investigation, and that said documents were also in said FBI files at the time Mr. Miller was in charge of the Intelligence Division during the period of this indictment. This information was given to me by government counsel Mr. Martin at the conclusion of an in-chambers hearing on January 31, 1979.

  
Thomas A. Kennelly

District of Columbia: ss:

Subscribed and sworn to before me this 4th day of April, 1979.

  
NOTARY PUBLIC

My Commission Expires:  
February 14, 1980

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v.

L. PATRICK GRAY, III  
W. MARK FELT and  
EDWARD S. MILLER

Criminal No. 78-000179

ORDER

Defendant Miller, having moved to dismiss the indictment on grounds of failure of the government to comply with the Court's discovery orders, and good cause appearing therefor, it is hereby

ORDERED, that the indictment is hereby DISMISSED as to Defendant Edward S. Miller.

Date: \_\_\_\_\_

\_\_\_\_\_  
United States District Judge



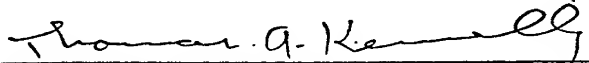
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Points and Authorities in Support of Motion by Defendant Miller to Discuss Indictment, Motion by Defendant Miller to Dismiss Indictment, and the proposed Order, was mailed, postage prepaid on this 4<sup>th</sup> day of April, 1979 to the following:

Francis J. Martin, Esquire  
Department of Justice  
Federal Triangle Building  
Room 600  
Washington, D.C. 20530

Alan I. Baron, Esquire  
1300 Mercantile Bank & Trust Building  
2 Hopkins Plaza  
Baltimore, Maryland 21201

Brian P. Gettings, Esquire  
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FEDERAL BUREAU OF INVESTIGATION  
FOIPA  
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